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No. 165

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, APPELLANT,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 1216

UNITED STATES OF AMERICA, PLAINTIFF,

v.

E. I. DU PONT DE NEMOURS AND COMPANY,
DEFENDANT

STATEMENT AS TO JURISDICTION

(Filed April 23, 1954)

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on February 23, 1954. A petition for appeal is presented to the district court herewith, to wit, on April 23, 1954.

OPINION BELOW

The opinion of the district court is not yet reported.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions, *inter alia*, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *U. S. Gypsum Co.*, 333 U. S. 364;

United States v. *Griffith Amusement Co.*, 334 U.S. 100.

QUESTIONS PRESENTED

The ultimate question presented is whether the district court's conclusion that defendant has not illegally monopolized interstate commerce in cellophane involves errors of law and is based on the application or erroneous legal tests and principles.

The subsidiary questions presented are:

(a) Whether the court erred in holding that defendant's monopoly power respecting trade in cellophane is to be determined, not by its control of such trade, but by its control of "the market for flexible packaging materials."

(b) Whether the court, in holding that the defendant did not have power to exclude competitors, (1) erroneously ignored facts (established by its findings) which are of controlling importance on

this issue, (2) erroneously made the flexible-packaging-materials field the test of power to exclude, and (3) erroneously equated actual exclusion with power to exclude.

(c) Whether the court, in holding the defendant did not have power to raise cellophane prices, (1) erroneously concluded as a matter of law, that such power does not exist if the relationship between cellophane prices and prices of other materials is a competitive factor in sales for certain uses, and (2) erroneously ignored facts (established by its findings) which are of controlling importance on the issue of power to raise cellophane prices.

(d) Whether the court erred in failing to hold that defendant's long-continued dominance of trade in cellophane, maintained and abetted by numerous exclusionary practices and agreements found by the court, constituted illegal monopolization irrespective of whether such practices and agreements were in themselves unlawful or predatory in character.

(e) Whether the court erred in holding, as a matter of law, that defendant's moisture-proof patent "represents a defense to the monopoly charge."

STATUTE INVOLVED

The pertinent provisions of Sections 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 2, 4), commonly known as the Sherman Act, are as follows:

> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or con-

spire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil proceeding under Section 4 of the Sherman Act charging E. I. du Pont de Nemours and Company (du Pont) with monopolizing, attempting to monopolize, and conspiring to monopolize interstate commerce in cellophane and cellulosic caps and bands, in violation of Section 2 of the Act. The proceeding was instituted in December 1947 in the United States District Court for the District of Columbia, and was subsequently transferred to the District of Delaware pursuant to defendant's motion under 28 U.S.C. 1404(a). Trial of the case began in January 1951 and ended in May 1952. Final arguments were heard in January 1953, and on December 14, 1953, the court rendered an opinion holding that the evidence did

not establish the charges of the complaint. Judgment dismissing the complaint was entered on February 23, 1954.

The court incorporated in its opinion 854 findings of fact (Op.[1] 15-306). The court thereby adopted, with a few insignificant changes in wording, each of the 854 findings and accompanying notes proposed by the defendant.

This appeal attacks only the determination that du Pont has not illegally monopolized interstate commerce in cellophane. The court, in so determining, ruled that du Pont has not had power to raise prices or to exclude competitors (Op. 327-341), and that its dominant position in the cellophane industry resulted from "technical skill and competitive activity" (Op. 341-351) and has not been maintained by "predatory assertion of monopoly power" (Op. 359-377). The grounds upon which the court rested its conclusions will be set forth later under the heading "The Questions [presented by the appeal] Are Substantial." At this point we merely summarize the facts (shown by the court's findings or by uncontradicted evidence) as to du Pont's entry into the cellophane business, the subsequent growth of the industry, and du Pont's position therein.

About 1912 a Frenchman invented the process and machinery for manufacturing cellophane, and

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[1] We shall use herein the following abbreviations: "Op." to refer to the court's opinion (see Appendix A, *infra*), "GX" to refer to a Government exhibit, and "DX" to refer to a du Pont exhibit.

later transferred his processes and patents to a French corporation, La Cellophane, which was the first company to manufacture cellophane on a commercial basis. As a result of negotiations between du Pont and La Cellophane, a written agreement was entered into in June 1923 providing for organization of a company to manufacture cellophane in the United States, with du Pont to receive 52% of its stock and La Cellophane 48%. For such stock, du Pont was to contribute cash of $866,667; La Cellophane was to contribute $133,333 and, in addition, its patents, processes and technical assistance, including designs for all machinery, information as to chemical compositions and controls, and disclosure (through plant inspection and training of personnel) of all phases of production know-how. (Fngs. 15, 18, 21-23, 33.)

Information of the kind received from La Cellophane was essential to commercial manufacture of cellophane. Du Pont could not have developed a successful process for cellophane manufacture in less than five to eight years and then only at very substantial cost. La Cellophane had kept secret its process of manufacture by a system of fences, plant guards and passes, and the new American company used "similar means to maintain secrecy." Du Pont still employs the fundamentals of the process received from La Cellophane. (Fngs. 29, 32, 34, 36.)

The agreements with La Cellophane gave the new company the exclusive right to make and sell cellophane in North and Central America, and barred La Cellophane from otherwise engaging, directly

or indirectly, in manufacture of cellophane in this area (fngs. 24, 620). From 1924, when the new company started production, until 1930 it had a monopoly of domestic production, and in this period its dollar cellophane sales increased more than 8-fold—from about $1,300,000 in 1924 to about $10,900,000 in 1930 (fng. 337). When du Pont acquired the French stockholdings in the company in 1929 (fng. 28), it gave in exchange therefor du Pont stock then having a market value of more than $12,100,000 (DX 735).[2] On this basis, the cellophane company stock which du Pont had acquired in 1923 for $866,667 was worth more than $13,100,000 in 1929, and thus had multiplied in value more than 15 times in less than six years.

Sylvania Industrial Corporation (Sylvania) began production of cellophane in 1930. It was organized by a Belgium concern which had started manufacture of cellophane in Belgium after La Cellophane's chief engineer, together with one of its principal administrative officials, had absconded with blueprints and complete information as to La Cellophane's process for making cellophane. The Belgium company supplied all of the processes, technical information and operating know-how used by Sylvania. (Fngs. 615-618.)

Notwithstanding an unbroken and phenomenal growth in cellophane sales from 1930 onwards, no

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[2] The cellophane company, which became a wholly owned subsidiary of du Pont in 1929, transferred its assets and business to du Pont in 1936 and thereupon was dissolved (Ans. to Compl., par. 3).

new company came into the business until 1951, and this new entry directly resulted from du Pont's willingness, solely by reason of the pendency of the present suit, to make available complete technical assistance, as well as patent rights (fngs. 53, 662-665). Dollar sales of cellophane increased every year during the 1930-1950 period except in 1942 when the Government, as a war measure, curtailed cellophane production (fngs. 337, 346). In round figures, dollar sales were $10,900,000 in 1930, $72,800,000 in 1947 (when demand exceeded supply), and $128,600,000 in 1950 (fngs. 337, 349). Not only did sales increase more than 11-fold during the 20 year period, but the business, particularly for du Pont, was highly profitable. According to its own computation, its "operative return" from cellophane sales averaged over 31% for the years 1937 to 1947 inclusive (GX 591).

During the 1931-1950 period, du Pont made and sold 75% of the total amount of cellophane manufactured in the United States (fng. 308). And throughout this period imports were negligible. The evidence on imports covers the years 1930 to 1947 inclusive, and shows that in every single year imports were less than 1/2 of 1% of domestic production, and for the entire period were less than 1/10 of 1% (GX 539).

Other facts bearing upon du Pont's power to dominate, and domination of, trade in cellophane, are: Compared with its sole competitor, Sylvania, du Pont's cellophane has been superior in quality (fngs. 309, 316), its manufacturing efficiency mate-

rially greater (fng. 319), its sales and technical service to customers incomparably better (fngs. 328, 330), and customers have been offered a wider variety of types of cellophane (fng. 311). The price of cellophane has consistently been fixed by du Pont, not Sylvania. Their price lists have been identical, and the reason for the price identity was that Sylvania adopted du Pont's prices; when du Pont put out a new price list, Sylvania immediately put out a new list of matching prices, dating back its list to the effective date of the du Pont list (fngs. 586-588).

THE QUESTIONS ARE SUBSTANTIAL

(1) The district court held that the test to be applied in passing upon the monopoly charge was whether du Pont had monopoly power over trade in the entire field of all flexible packaging materials, and not merely in the cellophane industry (fngs. 37, 838; Op. 311-327). The court did not disavow the settled rule that the statutory prohibition against monopolizing "any part" of interstate commerce has both a geographical and a product application. But the court gave the prohibition a limited effect by construing it to mean that a product cannot be monopolized in violation of Section 2 of the Sherman Act if there is a free market in goods which are possible substitutes. We submit that this construction of the Act emasculates the statutory prohibition and is in conflict with the controlling principles declared by this Court.

In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, the principal issue was

whether the publisher of two New Orleans newspapers exploited a position of market dominance when it tied sale of advertising space in the city's sole morning paper with sale of space in one of its two afternoon papers. This Court held (pp. 611-612) that market dominance was to be determined without reference to any media, other than the city's newspapers, available for bringing advertising to the attention of the New Orleans public. Other advertising media were not to be taken into consideration because the evidence did not show that, on the basis of "buyers' habits or mobility of demand," they were one and the same thing with newspaper advertising. In elaborating this point, the Court said (note 31, p. 612):

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small.

In *Times-Picayune* the Court further ruled (p. 613) that since advertisers regarded the city's newspaper readers as fungible customer potential, they bought the "selfsame" product when they purchased space in either a morning or an afternoon paper. Hence, advertising in the morning paper was not a market separate and distinct from advertising in the city's other newspapers.

In *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F.2d 80; 85 (C.A. 2),[3] the court (per Judge Learned Hand) held that a product may be illegally monopolized even though the attractions which it has for purchasers do not constitute "a very important margin of advantage." The court, in so holding, observed that "the same is true of nearly all monopolies, for there are substitutes for most goods" (*ibid.*).

In the present case the district court held that cellophane is not a sufficiently distinctive product, or does not have a sufficiently separate market of its own, to be capable of being illegally monopolized. But the dollar sales of cellophane, which were nearly $73,000,000 in 1947 at a time when demand exceeded supply and were over $123,000,000 in 1950 (*supra*, p. —), show a vast commercial demand for a product possessing the special characteristics of cellophane. This irrefutable evidence of a vast demand for cellophane, as distinguished from any other flexible packaging material, is rendered doubly significant by the fact that cellophane not only has radically different characteristics but sells in an entirely different price category from the opaque or partially transparent products (fng. 59) —glassine and waxed paper—which the court describes (Op. 327) as "the two principal packaging materials".[4] The price of moistureproof cello-

[3] Affirmed 312 U.S. 457, without discussion of this point.

[4] In 1944 these products together supplied, on a yardage basis, more than double what was supplied by cellophane (fng. 280).

phane, which constituted 86.4% of total cellophane production for the years 1943 to 1947 inclusive (fng. 336), was seven times that of glassine in January 1929, 4 times the price of glassine and 4¼ times the price of waxed paper in January 1934, and over twice that of glassine and twice that of waxed paper in January 1949 (fng. 136).

Cellophane has occupied a great middle ground between (1) products with less desirable over-all characteristics but selling at one-half or less the price of cellophane and (2) transparent products such as Saran, cellulose acetate, polyethylene, and pliofilm (fng. 59), which more closely approximate the characteristics giving value to cellophane, but which sell at prices from 69% to 107% above that of moistureproof cellophane (computed from fng. 130). There are limited uses for which one or more of these products are more valuable than cellophane, and the demand which they serve marks the upper limit, quality-wise, of the market which is peculiarly cellophane's. A du Pont official report states that "while non-cellophane and cellophane film markets overlap, prices are different, and the combination of useful properties in the non-cellophane films are by no means identical with cellophane," and that "until some other film can do cellophane's entire job or until another film reaches cellophane's cost," non-cellophane films will attack cellophane only "marginally" (GX 587).

We give just one illustration to show that cellophane has markets, representing sales running

into millions of dollars, in which it reigns supreme. It is used as the outer wrap for 95% to 100% of all packages of cigarettes sold in the United States (fngs. 292, 314; Tr. 5823), and du Pont's 1950 sales for this use were over $11,500,000 (11.6% of du Pont's sales of approximately $99,180,000, fngs. 292, 337).

We submit that the conclusion that monopolization of a product is negatived by a showing that there are substitutes which purchasers will use provided they sell at a price differential sufficient to offset the combination of characteristics which give value to and create demand for the monopolized product, presents not only a question of substance but also a question of fundamental importance in the application of Section 2 of the Sherman Act.

(2) In *American Tobacco Co.* v. *United States*, 328 U.S. 781, 811, the Court said that the primary consideration in determining whether there is illegal monopolization is whether "power exists to raise prices or exclude competition when it is desired to do so." The district court in this case, although not questioning this legal proposition, applied it in an unduly restrictive fashion. This case thus presents occasion for delineation of the legal standards and criteria which the district courts should apply in determining existence of power to raise prices or to exclude competition.

We submit that the district court erred both in the tests which it applied and in those which it failed to apply. Affirmative tests which we view

as erroneous are that du Pont did not have power to inhibit entry into the manufacture of flexible packaging materials (Op. 333-334), that it was not shown that du Pont had actually excluded certain companies from entering the cellophane business (*id.*, 335-337), and that one company (Sylvania), had, in fact, entered and continued in this business (*id.*, 338-341).

An even more serious error is that the district court totally disregarded, with reference to power to exclude, undisputed facts which are persuasive, if not absolutely decisive, of the existence of such power. No consideration was given to the inherent inconsistency between the assumed ability freely to enter the cellophane business and the fact that, in an industry which was constantly expanding and highly profitable, only one company came into the business during a period of 24 years (1924-1947 inclusive), and no company entered the business during the last 18 years. No consideration was given to the fact that du Pont, without La Cellophane's technological assistance, could not have developed a successful process for making cellophane in less than five to eight years (fng. 32), or to the related fact that du Pont, by contract, barred La Cellophane from extending such assistance to any other American company (fng. 620). No consideration was given to the question whether such barriers to entrance into the business, when the industry was in its infancy, were multiplied as the industry matured. No consideration was given to the power to bar entry into the business

arising from agreements with the three principal foreign producers of cellophane, under which du Pont became entitled to their future cellophane patents and technology (fngs. 593-596, 609). No consideration was given to the fact that during the period 1924-1947 du Pont has had rights under 368 patents relating to cellophane, of which 93 were used in its commercial operations (fngs. 470, 472).

We submit that the district court erred in ignoring these relevant, if not controlling, considerations bearing on this issue, and that the appeal, in attacking the legal basis for the district court's determination of lack of power to exclude competition, presents a substantial question.

(3) Concerning power to raise prices, the other indicium of illegal monopolization referred to in the *American Tobacco* case, *supra*, the district court made no finding of fact that du Pont lacked such power. But statements in the court's opinion indicate that it concluded that du Pont's powers in this respect fell short of signifying monopolistic power over cellophane prices. Thus the court stated that du Pont does not have the power to raise prices "without regard for competitive pressures" (Op. 327), that it does not have power to raise prices "in the manner of a monopolist" (*id.*, 330), and that its prices resulted from competitive conditions in the "market," i.e., the market for flexible packaging materials (*id.*, 332).

Plainly du Pont had the power to raise cellophane prices as far as Sylvania's competition was

concerned. This is indubitably shown by the fact that du Pont, not Sylvania, has consistently fixed cellophane prices (*supra*, p.). The identity in the prices of the only two companies engaged in marketing cellophane was due both to Sylvania's "desire to obtain as high a price for its cellophane as it could" and to its "inability to sell" at prices higher than du Pont's (fng. 588).[5]

Du Pont's power to raise cellophane prices was thus not limited by competitive pricing of cellophane by others. Moreover, it had a wide margin within which to exercise its power to raise the price because, as previously stated, cellophane and the other principal packaging materials were in totally different price categories. Du Pont, as the arbiter of the price of cellophane, was free to determine the particular price which, multiplied by estimated volume of sales at the price selected, would yield the highest net return.

The district court stressed the general downward trend of cellophane prices (Op. 328; fngs. 124, 126). But the monopolist of any product which has a secure market of its own may well determine that a larger volume of sales at relatively low prices will yield a higher profit than smaller sales at relatively high prices. Freedom to fix prices at the level which will maximize profit, without need

[5] After Sylvania entered the business there were upward as well as downward changes in du Pont's prices. In 1937, 1938, 1944, 1947, 1948, 1949 and 1950 du Pont's average cellophane prices were higher than its average prices in the preceding year (fng. 126).

to consider the prices offered or likely to be offered by sellers of substantially the same product, is the very essence of monopoly power over price.

Insofar as the district court determined that du Pont lacked monopolistic power to raise or control cellophane prices, the appeal, in attacking this determination, raises a question which clearly is of substance.

(4) In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 285, 342 (D. Mass.), appeal pending No. 394, October Term, 1953, the district court, after a perceptive examination of applicable decisions, declared that it is a violation of Section 2 of the Sherman Act "for one having effective control of the market to use, or plan to use, any exclusionary practice, even though it is not a technical restraint of trade." The Government submits that this is a correct interpretation of Section 2 and that the decision in the instant case cannot be squared with the holding in *United Shoe*.

Du Pont clearly had "effective control of the market." This is established by its control of 75% of production, its fixing of market prices, and its superiority over its one competitor in quality of product, service to customers, manufacturing efficiency, and diversification in types of cellophane produced (*supra*, p —). It might also be added that, in the matter of financial resources, Sylvania, at least prior to its acquisition by American Viscose Corporation in 1946 (fng. 578), was a veritable pigmy compared with du Pont.

That du Pont was a party to numerous important exclusionary agreements and practices is shown by the court's finding and by evidence which is undisputed. Du Pont's 1923 agreement with La Cellophane was highly exclusionary. It provided that La Cellophane should not "engage in or become directly or indirectly interested in any other business or enterprise on the North American continent, or in Central America, engaged in the manufacture of cellophane, either as stockholder, principal or agent, or in any other capacity." (GX 1001, par. 11; fng. 620). Du Pont's agreement licensing Sylvania under du Pont's moistureproof patent was exclusionary in that it set limitations on Sylvania's production of moistureproof cellophane, the type of cellophane then chiefly marketed.[6] The limitation on production took the form of a prohibitive royalty on all moistureproof cellophane produced by Sylvania in excess of stated percentages of the combined production of du Pont and Sylvania (fng. 545, par. 12).[7] The amount which Sylvania could produce without payment of the prohibitive royalty was 20% of combined production in 1933 and in each of the next nine years

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[6] In the two years prior to the 1933 agreement du Pont's dollar sales of moistureproof cellophane were more than double its plain cellophane sales (fng. 337).

[7] The royalty on excess production was admittedly prohibitive. On production within Sylvania's quota, the royalty was 2% of net selling price; on excess production it was 30% of net selling price or 20¢ per pound, whichever was *greater* (fng. 545, par. 12).

an additional 1%, and thereafter 29% (*ibid.*).[8] The 1933 agreement with Sylvania was exclusionary in another respect. It provided for cross-licensing of future moistureproof patents, and provided that neither party could license a third person under a patent licensed to the other party without the latter's consent (fng. 595, pars. 3, 4, 15).

Du Pont entered into exclusionary agreements in connection with distribution of cellophane. Du Pont sells from 35% to 40% of its cellophane through converters (fng. 36), and for the years 1939 to 1946 inclusive it entered into agreements with its most important converter customers, which required the converter to purchase his cellophane requirements exclusively from du Pont (fng. 404). Du Pont's agreements with the leading foreign producers of cellophane served to implement divisions of marketing territory (fngs. 501-602).[9] And when du Pont licensed a Canadian company to manufacture cellophane, the license was restricted to sales in Canada (fng. 599).

We submit that the district court took too narrow a view of the monopolization issue when it considered the foregoing exclusionary practices only from the standpoint of whether they were "lawful" (Op. 351-359) or whether they constituted a

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[8] These limitations on Sylvania's production remained in effect until January 1, 1945, when the 1933 agreement was terminated (fng. 58).

[9] The district court found that since October 17, 1940, du Pont has not observed any territorial limitations upon the import or export of cellophane (fng. 605).

"predatory" assertion of monopoly power (*id.*, 359-377). See *United Shoe* case, *supra*; *American Tobacco* case, *supra*, at p. 809; *United States* v. *Griffith Amusement Co.*, 334 U.S. 100, 106-108; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427-432 (C.A. 2).

If power to dominate a trade, achieved or maintained with the aid of exclusionary practices, constitutes conduct forbidden by Section 2 of the Sherman Act, it is immaterial that there were other contributory factors, such as "research, business skill and competitive activity" (see Op. 347).

(5) The district court declared that du Pont's product patent on moistureproof cellophane "represents a defense to the monopoly charge" (Op. 344). The patent issued November 26, 1929 (fng. 533) and expired November 26, 1946. Its scope and validity have never been adjudicated. The one suit for infringement of the patent, brought against Sylvania in 1932, was settled by the 1933 license agreement with Sylvania to which we have previously referred (fngs. 536, 538).

The patent obviously is no defense to monopolization before the patent issued or after it expired. It is no defense at any time to monopolization of trade in plain cellophane. Patent abuses, incident to the restraints on trade embodied in the license agreement with Sylvania, probably render the patent unenforceable. Cf. *United States* v. *Line Material Co.*, 334 U. S. 287; *United States* v. *Besser Manufacturing Co.*, 96 F. Supp. 304, 311 (E. D.

Mich.), affirmed, 343 U. S. 444; *United States* v. *General Electric Co.*, 88 F. Supp. 753, 858 (D. N.J.)

Under these circumstances, the district court's holding that the claims of a single unadjudicated patent furnish a blanket defense to monopolization of a $100,000,000 industry certainly presents a question of substance.

Substantially all of the "findings" which the appeal attacks are findings which are enmeshed with questions of law, or are conclusory findings resulting from application of legal tests or principles believed to be erroneous, or are adverse conclusions on ultimate issues arrived at by ignoring or giving insufficient weight to material facts found by the court or established by undisputed evidence.

CONCLUSION

We submit that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

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